IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RON LEN NEFF, Appellant.	No. 32402-4-II UNPUBLISHED OPINION

BRIDGEWATER, J. — Roy Len Neff appeals his conviction for unlawful manufacturing of a controlled substance—methamphetamine with a firearm sentence enhancement. We affirm.

Deputy James Jones of the Pierce County Sheriff's Department responded to a suspicious vehicle call in unincorporated Pierce County. While en route, Deputy Jones smelled ammonia coming through his defroster vent. When he stopped his cruiser and got out in an attempt to locate the smell's origin, a man came out of a nearby house and pointed Deputy Jones to Neff's house 40 yards from the road.

Deputy Jones drove his cruiser onto the Neff's property, and, seeing a woman and child in the window of the house, walked to the front door. He contacted the woman, Mrs. Neff, told her that he was concerned that there were harmful chemicals somewhere on the property, and asked her if he could look around. Mrs. Neff acknowledged the smell and consented. Deputy Jones began walking around the property trying to locate the smell's origin.

At this point, Neff approached Deputy Jones. He told Deputy Jones that the previous occupants of the house had had a methamphetamine lab on the property and that he had been disposing of various tanks he found in the sticker bushes. Deputy Jones and Neff then began looking around the property for the source of the smell and were joined by a Mr. Rowlands. The smell was strongest near a detached garage.

Eventually, Deputy Jones noticed a burn pile next to the garage. The pile contained several cold medicine blister packs, which are often used in drug labs as the source of pseudoephedrine, the main ingredient of methamphetamine. He also found a garden sprayer that he determined, from past experience with methamphetamine labs, to be a hydrochloric acid (HCl) gas generator, a device necessary for methamphetamine production. At this point, Deputy Jones believed that there was an active drug lab. Neff and Rowlands tried to leave, but other officers detained them. Officers told Mrs. Neff that she had to stay as well. While Neff was being placed in a police cruiser, he threw a set of keys under the car and Deputy Jones retrieved them.

Deputy Mark Fry from the lab responder team arrived shortly after Neff was put in the police car. Deputy Fry was concerned that they had not yet located the smell's source and moved people away from the garage. He then used Neff's keys to open the locked garage to perform a

safety assessment and to make sure that there were no conditions that might cause chemical release or a fire. After entering, Deputy Fry found what appeared to be a methamphetamine manufacturing lab and a marijuana grow operation. He also found anhydrous ammonia in a wood stove venting through a chimney stack; this was causing the odor outside. Deputy Fry then left the garage.

Meanwhile, Detective John Crawford, the on-call detective, arrived at the scene. He interviewed Mrs. Neff, and she told him that Neff was manufacturing methamphetamine in the garage. Based on the interview tape, the trial court determined that Detective Crawford obtained Mrs. Neff's statement without referring to evidence in the garage.

Detective Crawford then applied for a search warrant, including Deputy Jones's initial observations, Deputy Fry's observations from inside the garage, and Mrs. Neff's statements in his probable cause affidavit. The magistrate granted the search warrant covering both the garage and Neff's house.

The officers reentered the garage and seized more that 120 items consistent with a methamphetamine lab and marijuana grow operation. The officers also found several video surveillance cameras with a console inside the garage, allowing the occupant to observe the area surrounding the garage. In addition, the officers found two loaded handguns, a .357 caliber Smith and Wesson and a .45 caliber Colt handgun, along with several bags of marijuana and a container of methamphetamine in a safe under a desk in the garage, a loaded .380 handgun in a tool belt hanging from the garage rafters, and a shotgun in the bedroom of Neff's house.

On the basis of the evidence seized in the garage, the State charged Neff with six felony

counts, including unlawful manufacture of methamphetamine and marijuana, illegal possession of anhydrous ammonia and pseudoephedrine, possession of controlled substances with intent to deliver, and unlawful possession of firearms. Five of the counts had firearm enhancements.

Neff sought to suppress the evidence from the garage because Deputy Jones entered his property without probable cause and because Deputy Fry initially entered the garage without a search warrant. The trial court found that Deputy Jones went on the property and began searching for the source of the ammonia smell under his community caretaking authority. Therefore, the trial court reasoned, the evidence that Deputy Jones observed on the burn pile and in the garden sprayer was admissible. Rejecting the State's argument that Deputy Fry entered the locked garage to deal with a possible emergency, the court found that the initial warrantless entry into the garage was improper.

Nonetheless, the trial court ruled that materials found in the garage were admissible under the independent source exception to the exclusionary rule. Excising all Deputy Fry's observations in the affidavit of probable cause, the trial court found that there was sufficient probable cause to uphold the search warrant. Because the search warrant was not tainted by the illegal search, the court determined that the seized evidence was admissible.

After the jury voir dire began, the State and Neff reached an agreement short of trial. The State agreed to charge Neff with a single count of manufacturing methamphetamine with a firearm enhancement, and Neff agreed to stipulate to the facts in the police reports and proceed with a bench trial. In addition, Neff waived his right to appeal the sufficiency of the evidence while preserving his right to appeal the suppression ruling.

At the bench trial, the trial court found Neff guilty beyond a reasonable doubt of unlawful manufacturing of a controlled substance, methamphetamine, and found that Neff was armed while committing the crime. The court sentenced Neff to 89 months[1] for the manufacturing conviction with a 36-month flat time for the firearm enhancement, for a total sentence of 125 months. Neff appealed the trial court's suppression ruling and challenged the sufficiency of the evidence for the firearm enhancement.

I. Suppression

Neff argues that the trial court should have suppressed the evidence police seized in the garage because Deputy Fry's initial warrantless search tainted the search warrant. The State urges us to hold that the independent source exception to the exclusionary rule applies.

We review a trial court's conclusions of law at a suppression hearing de novo. *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004). We review challenged findings of fact for substantial evidence, which is enough evidence to persuade a fair-minded rational person of the truth of the finding. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Unchallenged findings are verities on appeal. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). The findings must support the conclusions of law. *Vickers*, 148 Wn.2d at 116.

Evidence seized during illegal searches and evidence derived from illegal searches is subject to suppression under the exclusionary rule. *State v. Gaines*, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). Under the independent source exception to the exclusionary rule, evidence

[1] The State's plea agreement initially recommended 114 months total, but Neff failed to appear at his original sentencing hearing. In exchange for not charging him with bail jumping, the State increased its recommendation to 125 months.

tainted by unlawful government actions is not subject to exclusion provided it is ultimately obtained under a valid warrant or other lawful means independent of the unlawful action. *Gaines*, 154 Wn.2d at 718.

In this case, the officers obtained a search warrant and validly executed it. Therefore we must determine if, without the evidence from the illegal search, there was sufficient probable cause to support the search warrant's validity.

A search warrant may be issued only upon a determination of probable cause. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that evidence of a crime will be found at the place to be searched. *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). A search warrant is not rendered invalid by the inclusion of illegally obtained information if it contains otherwise independent facts sufficient to establish probable cause. *State v. Maxwell*, 114 Wn.2d 761, 769, 791 P.2d 223 (1990).

Here, the warrant had independent facts sufficient to establish probable cause. Deputy Jones's observation of the blister packs, the HCl generator, the overwhelming smell of ammonia that seemed to come from the garage, Neff's attempts to distract Deputy Jones, and the statement by Mrs. Neff that her husband was cooking methamphetamine were sufficient to create probable cause to search the garage for an illegal methamphetamine lab.[2] Because police obtained this information independently, the trial court properly upheld the search warrant. *Maxwell*, 114

[2] We emphasize that the trial court found, orally, that Detective Crawford obtained Mrs. Neff's statement without referring to evidence in the garage. Mrs. Neff's statement that her husband was cooking methamphetamine in the garage was therefore untainted by the illegal search.

Wn.2d at 769.

But for the independent source exception to apply, the trial court must also find that the officers would have sought the valid search warrant even had they not illegally entered the garage. *State v. Spring*, 128 Wn. App. 398, 405, 115 P.3d 1052 (2005), *review denied*, 156 Wn.2d 1032 (2006). In other words, the State must show that the officers were not prompted to obtain the search warrant by what they saw in the initial entry. *Murray v. United States*, 487 U.S. 533, 542, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).

The trial court found that the responding deputies would have sought and been granted a search warrant without evidence from the initial search. We must therefore determine if there was substantial evidence to support the trial court's finding. *Vickers*, 148 Wn.2d at 116.

And the record contains substantial evidence to support the trial court's finding of fact. Deputy Jones believed that there was an active drug lab as soon as he found the burn pile and HCL generator. He and the other officers detained Neff, Rowlands, and Mrs. Neff because of this belief. And Deputy Jones testified at the suppression hearing that he requested a detective to begin the warrant process because he himself was unsure of proper process for getting a valid warrant. This indicates that Deputy Jones intended to get a search warrant anyway; Deputy Jones was already thinking about a warrant when he requested support. On these facts, a fair-minded rational person could conclude that the officers were going to get a search warrant regardless of what Deputy Fry found inside the garage. *Spring*, 128 Wn. App. at 405.

Neff argues that the record is unclear about the timing of Deputy Jones's request for a detective to begin the search warrant. Deputy Jones was unsure when Detective Crawford arrived at the scene, and he did not actually call Detective Crawford; Deputy Fry did. And

Deputy Fry was the one who entered the garage. Neff suggests this means that that the officers did not begin the search warrant process until after the illegal entry and therefore the search warrant was not independent.

We disagree. Deputy Jones already believed that there was a methamphetamine lab in the garage before Deputy Fry arrived. He had, in fact, already arrested Neff. A reasonable trier of fact could infer from the context that Deputy Jones knew he needed a search warrant to enter the locked garage and that was the point at which he requested assistance in preparing the warrant. And this appears to have been before Deputy Fry arrived. Therefore, substantial evidence supports the trial court's finding that the officers would have obtained a search warrant even had they not illegally entered the garage. Thus, the trial court properly applied the independent source exception to the exclusionary rule and properly admitted evidence the police seized from the garage.

II. Waiver of Appeal of Enhancement

Neff next argues that the evidence was insufficient to support the firearm enhancement. The State argues that Neff waived his right to appeal his firearm enhancement by signing an agreement to a stipulated facts trial that included an express waiver. The State is correct.

A defendant in a criminal trial may waive his right to appeal so long as his waiver is done intelligently, voluntarily, and with an understanding of the consequences. *State v. Perkins*, 108 Wn.2d 212, 215, 737 P.2d 250 (1987). A waiver of the right to appeal is no more fundamental than the right to a jury trial and therefore can be waived. *Perkins*, 108 Wn.2d at 217. The State has the burden of showing that the waiver was voluntary, knowing, and intelligent. *State v.*

Tomal, 133 Wn.2d 985, 989, 948 P.2d 833 (1997). When a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary. *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998).

In this case, Neff signed an agreement with prosecutors to go to trial on stipulated facts. In exchange, the State reduced the charges from six felony counts to one felony count. In the Stipulation to Facts Sufficient and Stipulated Bench Trial, Neff agreed to "sufficient evidence to support a possible conviction of the defendant as charged." Clerk's Papers (CP) at 99. In addition, he agreed to waive:

> the right to challenge the sufficiency of the evidence to support these convictions on appeal, while reserving the right to challenge the trial court's suppression hearing findings and conclusions of law.

CP at 101.

The agreement also contained a paragraph (g) that gave the sentencing for a conviction of this offense and included the language "plus 36 months for the Firearm Sentencing Enhancement." CP at 101.

The import of these paragraphs was that Neff was not waiving sufficiency of the evidence for purposes of the trial but was waiving sufficiency of the evidence on appeal, if the court convicted him. And this specifically included the firearm enhancement.

The trial court verified that the agreement was voluntary, and specifically warned Neff that he was stipulating to evidence that may be sufficient to prove the charged offense and firearm enhancement. The court also warned Neff that he was waiving the right to challenge the sufficiency of the evidence on appeal. Warning Neff that he was giving away several

constitutional rights such as the right to a jury and to confront the witnesses, the trial court asked Neff several times if he was doing it freely and voluntarily and Neff replied, "Yes, sir." 3 Report of Proceedings (RP) (Nov. 25, 2003) at 222, 224, 227. The court also clarified that Neff went over the entire document with his attorney. And Neff's trial attorney specifically clarified that Neff was waiving the right to appeal the sufficiency of the evidence but preserving the right to appeal the suppression hearing. When asked to explain what he was doing, Neff replied, "I'm making a plea deal with the prosecutor." 3 RP at 220.

Although a stipulated trial normally preserves the right to appeal, Neff specifically waived his right to appeal the sufficiency of the evidence in this case. On the basis of this record, Neff's decision to waive his right to appeal the firearm enhancement on sufficiency of evidence grounds was voluntary, intelligent and, therefore, valid.

III. Nexus of Firearms to the Crime

Even though we have held that Neff waived any challenge to the sufficiency of the evidence on appeal for the enhancement, we address it because of his claim of ineffective assistance of counsel for negotiating a plea bargain regarding the firearm enhancement. Neff's contention is that the mere presence of a firearm is not sufficient to support his enhancement. But, we hold there was sufficient evidence to support the enhancement regardless of the waiver.

In order to show ineffective assistance of counsel, Neff must show (1) that his attorney's performance was deficient and (2) that this deficiency prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Neff has the burden of showing both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35,

899 P.2d 1251 (1995). Deficient performance is that which falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). But we begin with a strong presumption that a counsel's conduct fell within the wide range of reasonable professional assistance. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If Neff counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot provide a basis for a claim of ineffective assistance of counsel. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To satisfy the prejudice prong of the ineffective assistance of counsel claim, Neff must show that counsel's performance was so inadequate that there is a reasonable probability that the result would have differed, thereby undermining our confidence in the outcome. *Strickland*, 466 U.S. at 694.

To the extent that Neff argues that his trial counsel was ineffective for negotiating a plea deal with the State waiving Neff's right to appeal, there was a legitimate trial strategy for signing such a deal. Neff was facing six felony counts, five with firearm enhancements, making them most serious offenses or strikes. Conviction on all counts would have seriously affected Neff's offender score and sentencing. Whether waiver was necessary to have the charges reduced to a single count is within the trial counsel's tactical discretion. Therefore, this claim fails.

To the extent Neff argues that competent counsel would have asked the trial court to reconsider its ruling on his firearm enhancement, Neff would first have to show that the trial court would have reconsidered its ruling and reversed its earlier ruling. Because the evidence was sufficient to support the trial court's finding that Neff was armed while manufacturing methamphetamine, his argument fails.

Whether a person is armed is a mixed question of law and fact. *State v. Schelin*, 147 Wn.2d 562, 565-66, 55 P.3d 632 (2002). Because Neff stipulated to the facts, our review of this question is de novo. *Schelin*, 147 Wn.2d at 566. The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of evidence is challenged in a criminal case, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

A person is armed "if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." *State v. Gurske*, 155 Wn.2d 134, 137-38, 118 P.3d 333 (2005) (quoting *Schelin*, 147 Wn.2d at 567). In addition, the State must prove a nexus (1) between the defendant and the weapon and (2) between the crime and the weapon. *Gurske*, 155 Wn.2d at 138, 141, 142.

The nexus requirement is the primary focus of this appeal. The nexus requirement serves to place parameters on determining when a defendant is armed, especially in the instance of a continuing crime. *Gurske*, 155 Wn.2d at 140. The *Gurske* court indicated that without a nexus requirement, a defendant may be punished for having a weapon unrelated to the crime. *Gurske*, 155 Wn.2d at 141. Thus, the mere presence of a weapon at a crime scene is insufficient to show

the defendant is armed. *State v. Willis*, 153 Wn.2d 366, 371-72, 103 P.3d 1213 (2005). We examine the nature of the crime, the type of the weapon, and the circumstances under which the weapon is found. *Schelin*, 147 Wn.2d at 570.

Washington courts have applied this nexus requirement in several recent cases addressing whether a defendant was armed while possessing drugs. These cases establish that the mere presence of a weapon is insufficient to prove that a defendant is armed even in cases of a continuing crime like drug possession. In *State v. Valdobinos*, 122 Wn.2d 270, 858 P.2d 199 (1993), officers acting under a valid search warrant arrested the defendant in a mobile home for possession with intent to deliver cocaine. *Valdobinos*, 122 Wn.2d at 273. The officers subsequently discovered an unloaded .22 rifle under a bed. *Valdobinos*, 122 Wn.2d at 281. The opinion does not clarify whether the gun was found under the same bed as the one under which officers found $1,875,846 worth of cocaine. *Valdobinos*, 122 Wn.2d at 274. The court determined that on these facts, the weapon was not easily accessible and therefore reversed the sentence enhancement. *Valdobinos*, 122 Wn.2d at 282.

In *State v. Johnson*, 94 Wn. App. 882, 974 P.2d 855 (1999), *review denied*, 139 Wn.2d 1028 (2000), the defendant was arrested trying to run into a bathroom after officers executed a search warrant looking for drugs. *Johnson*, 94 Wn. App. at 887. Officers placed the defendant in the living room and asked him if there were any weapons. *Johnson*, 94 Wn. App. at 888. The defendant then directed officers to a coffee table with a closed cabinet in which police found a weapon. *Johnson*, 94 Wn. App. at 888. Division One of the Court of Appeals reasoned that because the defendant was handcuffed and the gun was outside of his reach, it was not reasonably

accessible. *Johnson*, 94 Wn. App. at 897.

In *State v. Mills*, 80 Wn. App. 231, 907 P.2d 316 (1995), the police arrested the defendant after officers found drugs in his car during a consent search. *Mills*, 80 Wn. App. at 233. The police found a motel key and, after getting a search warrant, discovered additional drugs in the motel room next to a pistol in a gun pouch. *Mills*, 80 Wn. App. at 233. The court reasoned that there was no evidence that the defendant had been in the room where the weapon was on the day he was arrested and, because he would have had to travel several miles to retrieve the weapon, he was not armed. *Mills*, 80 Wn. App. at 234, 237.

Finally, in *State v. Call*, 75 Wn. App. 866, 880 P.2d 571 (1994), the defendant was arrested in his home after officers saw illegal drugs. *Call*, 75 Wn. App. at 868. Officers also found two unloaded handguns in his bedroom and a loaded handgun in a toolbox also in the bedroom. *Call*, 75 Wn. App. at 868. The court determined that even though at one point the defendant entered the bedroom to get his identification and returned unarmed, the weapons were not easily accessible and readily available. *Call*, 75 Wn. App. at 869.

These cases stand in contrast to *State v. Schelin*, where the defendant was standing at the bottom of some stairs 6 to 10 feet from a loaded weapon on the wall when police executed a search warrant. *Schelin*, 147 Wn.2d at 564. On those facts, the Supreme Court reasoned that because Schelin was in close proximity to a loaded gun he constructively possessed to protect his marijuana grow operation, the State had established the necessary nexus between him and the weapon. *Schelin*, 147 Wn.2d at 574-75.

Neff argues that these cases establish that he could not be armed because he was arrested

while outside of the locked garage where he kept his three loaded firearms. Accordingly, he argues, while he constructively possessed the weapons by virtue of holding the key to the locked garage, the weapons were not easily accessible or readily available. Neff argues that without some other evidence linking him to the weapon or the weapon to the drugs, there was insufficient evidence that the weapons were easily accessible or readily available.

It is possible for a defendant to be armed during the commission of a crime even if not arrested in close proximity to the weapon. We addressed such a case in *State v. Simonson*, 91 Wn. App. 874, 960 P.2d 955 (1998), *review denied*, 137 Wn.2d 1016 (1999). In that case, police responded to an explosion in a methamphetamine lab where a woman, badly burned, emerged. *Simonson*, 91 Wn. App. at 877. Police and emergency personnel found a loaded pistol outside in the mud and six other guns, three loaded, in the lab. *Simonson*, 91 Wn. App. at 877-78. The defendant was actually in prison on the day of the explosion on unrelated charges, but the court reasoned that the evidence supported the conclusion that he and the burned woman had been manufacturing methamphetamine over a six-week period and that during that time, they were armed to protect their operation. *Simonson*, 91 Wn. App. at 883.

In *Schelin*, the Washington Supreme Court noted that the *Simonson* decision had been critiqued by other divisions of the Court of Appeals, but affirmed its holding that the defendant or an accomplice must be in proximity to a deadly weapon w*hen the crime is committed*. *Schelin*, 147 Wn.2d at 572. In so doing, the Supreme Court has endorsed *Simonson*'s reasoning that it is possible to find that a defendant is armed even if they are not arrested in close proximity to the weapon so long as the evidence shows that they were armed during the commission of the crime.

These facts present a strong case for holding that a criminal can be armed during the commission of an offense even if arrested elsewhere. A reasonable finder of fact could infer that when Deputy Jones arrived, Neff was in the garage beginning to cook methamphetamine while armed. The anhydrous ammonia was in an open container, suggesting it was about to be used. The HCL generator was actively letting off gas, confirming that the ingredients for a cook were being prepared. Neff was not at his house initially and only came out to greet Deputy Jones when he began to look around the property leading to an inference Neff was in the garage when Deputy Jones arrived. That Neff had the keys to the locked garage indicates that it was he, not Rowlands, who was in the garage. And Mrs. Neff told police that it was her husband who made methamphetamine in the garage. The three loaded weapons in the garage were all easily accessible to someone inside cooking methamphetamine, especially because the surveillance system in the garage allowed the occupant to observe anyone approaching. The most likely explanation for these facts is that Neff was in the garage beginning to cook methamphetamine, saw Deputy Jones on the monitors, and emerged to try to dissuade Deputy Jones from investigating.

Taking all the evidence in favor of the State, a reasonable trier of fact could conclude that there was a nexus between Neff, the weapons, and the crime of manufacturing methamphetamine. Therefore, there was sufficient evidence to support the trial court's finding that Neff had easy access to weapons to use, either for offensive or defensive purposes, while committing the crime of manufacturing methamphetamine.

And, unlike the possession cases on which Neff relies, each batch of methamphetamine

takes a significant time to prepare. Because it takes a period of time to cook the methamphetamine, the trial court could also have inferred a connection between the drugs and the weapons even though Neff was arrested outside the garage.

Therefore, considering the nature of the crime, the type of the weapon, and the circumstances under which the weapons were found, there was sufficient evidence to find that Neff was armed during the illegal methamphetamine manufacture. Because we hold that there was sufficient evidence to support the firearm enhancement, the outcome would not have changed even if Neff's attorney had requested that the trial court reconsider its ruling. The trial court would have reached the same conclusion by considering our decision in *Simonson*. Thus, even if there was deficient performance (of which there is no evidence), there was no prejudice.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Quinn-Brintnall, C.J.

Penoyar, J.